

<b>Blumenstyk v Singer</b>
2015 NY Slip Op 30929(U)
June 2, 2015
Supreme Court, New York County
Docket Number: 651018/2013
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**LARRY BLUMENSTYK (INDIVIDUALLY) and  
HOLLY BLUMENSTYK (INDIVIDUALLY, AS  
TRUSTEE OF THE NATHAN LEDIS S/E  
DEFINED BENEFIT PLAN, AND AS TRUSTEE  
OF THE NATHAN LEDIS IRA), AND SUING IN  
THE RIGHT OF MEMBERS OF DODGE  
MORTGAGE LLC AND LIMITED PARTNERS  
OF 75<sup>TH</sup> & DODGE I LP and 75<sup>TH</sup> & DODGE II LP,**

**Plaintiffs,**

**DECISION AND ORDER**

**-against-**

**Index No.: 651018/2013  
Motion Sequence Number: 003**

**HENRY SINGER, JAY SEEMAN, DODGE  
MORTGAGE LLC, 75<sup>TH</sup> & DODGE I LLP,  
75<sup>TH</sup> & DODGE II LLP, HAS OMAHA  
CORPORATION, JOHN DOES 1-5  
(FICTITIOUS NAMES) AND XYZ CORPS. 1-5  
(FICTITIOUS NAMES),**

**Defendants.**

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**O. PETER SHERWOOD. J.**

Defendants Henry Singer, HAS Omaha Corporation (HAS), Dodge Mortgage LLC (Dodge Mortgage), 75th & Dodge I LLP (Dodge I), and 75th & Dodge II LLP (Dodge II) move, pursuant to CPLR 3211 (a) (1), (5), and (7), and CPLR 2221, for an order dismissing the amended complaint and granting leave to reargue this Court’s August 4, 2014 decision insofar as it denied their earlier motion to dismiss the cause of action alleging conversion. For the following reasons, the motion is granted in part.

## BACKGROUND

Dodge I and Dodge II are limited liability partnerships organized under the laws of Nebraska. Dodge Mortgage is a limited liability company organized under the laws of Delaware. Defendant Jay Seeman is no longer a party to this action.

The facts underlying this action are stated in a decision of the Nebraska Supreme Court, *Davenport Ltd. Partnership v 75<sup>th</sup> & Dodge I, L.P.* (279 Neb 615 [2010]). Briefly, Dodge I was the lessee of land under a shopping center in Omaha, Nebraska, pursuant to a written lease. Davenport Ltd. Partnership (Davenport) was the landlord. The lease could be renewed in minimum increments of 10 years, not to extend beyond 2059. In order to exercise its option to renew, Dodge I was required to give Davenport written notice least 12 months before the end of the term. Dodge I failed to give such notice in 2007. Accordingly, the ground lease expired on May 31, 2008.

The amended complaint alleges the individual plaintiffs are members of Dodge Mortgage and partners in Dodge I and Dodge II. Dodge II leased the real property from Dodge I and rented the retail spaces in the shopping center to business tenants. In 1996, Singer and former defendant Seeman formed Dodge Mortgage for the purpose of refinancing the mortgage on the property. Dodge Mortgage was funded with \$350,000 from various lenders, including some members of Dodge I and Dodge II. The then-existing note in the face amount of \$700,000, and its security were assigned to Dodge Mortgage. In 2006 or 2007, Singer stopped making payments to the Dodge Mortgage members. In December 2007, he disclosed that Davenport was contesting the rights of Dodge I under the ground lease.

The amended complaint alleges nine causes of action. The first seven are asserted as derivative claims on behalf of newly named plaintiffs Members of Dodge Mortgage LLC and Limited Partners of Dodge I and Dodge II. The claims are: (1) breach of fiduciary duty; (2) a request for an accounting; (3) breach of contract; (4) unjust enrichment; (5) piercing the corporate veil; (6) conversion; (7) negligence; (8) individual claims to an accounting; and (9) individual claims of conversion.

## DISCUSSION

### I. Motion for Leave to Reargue

As an initial matter, that branch of the motion which seeks leave to reargue regarding the original claim for conversion is denied as moot. The original complaint has been superseded by an amended complaint, which includes a claim for conversion that defendants now seek to dismiss (*see Peters v Peters*, 118 AD3d 593, 594 [1st Dept 2014]).

### II. Lack of a Demand for the General Partner to Bring this Claim

Partnership Law § 115-a (3) requires that, in any action brought by a limited partner on behalf of the partnership,

“the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the general partner or partners, or the reasons for not making such effort.”

Dodge I and Dodge II are limited partnerships. Therefore, limited partners seeking to bring an action on behalf of the partnership, as here, are required to specify their efforts to “secure the initiation of such action by the general partner or partners, or the reasons for not making such effort” (*id.*). The limited liability company law does not expressly provide a right to bring a derivative action, but the First Department has held that the legislative silence on this

point does not indicate an intent to override the existing common law right. A member of a limited liability company has the right to bring a derivative suit (*see Tzolis v Wolf*, 39 AD3d 138, 142 [1st Dept 2007], *aff'd* 10 NY3d 100 [2008]). In such a suit, plaintiff must make similar, particular allegations of efforts to have the partnership bring suit, or state why such efforts would be fruitless (*Segal v Cooper*, 49 AD3d 467, 468 [1st Dept 2008] citing Partnership Law § 115-a [3]; *see also* Business Corporation Law § 626[c] [similar provision for shareholders suing on behalf of a corporation]).

Courts have relieved plaintiffs of the obligation to make a demand when the demand would have been futile, as when a board of directors of a corporation is itself accused of breach of fiduciary duty and individual members of the board are named as defendants (*Barr v Wackman*, 36 NY2d 371 [1975]; *see also Bansbach v Zinn*, 1 NY3d 1 [2003]; *Stilwell Value Partners, IV, L.P. v Cavanaugh*, 118 AD3d 518, [1st Dept 2014]). Here, plaintiffs sufficiently allege that Singer completely dominated the entities on whose behalf the derivative causes of action are asserted, and that, therefore, a demand that he bring these claims would have been futile.

Delaware Law similarly requires a demand, and includes a similar exception (Del Code § 18-1001). However, actions pursuant to the Delaware Statute are to be brought in the Delaware Court of Chancery, so that statute is not directly applicable here. Nebraska, too, has a like statute, governing derivative actions in the right of limited partnerships (*see Neb Rev St* § 67-288).

### III. Standing

It is undisputed that the Blumenstyks have standing to assert claims on behalf of Dodge I and Dodge II, and that Holly Blumenstyk has standing to assert claims on behalf of Dodge Mortgage. Plaintiffs argue that Larry Blumenstyk also has standing to assert a claim on behalf of Dodge Mortgage, because Delaware law provides that

“In a derivative action, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action and:  
 (1) At the time of the transaction of which the plaintiff complains; or  
 (2) The plaintiff’s status as a member or assignee of a limited liability company interest had devolved upon the plaintiff by operation of law or pursuant to the terms of a limited liability company agreement . . . .”

6 Del Code § 18-1002. It is undisputed that Larry Blumenstyk became an assignee after most of the acts complained of in the amended complaint were performed, and that Dodge Mortgage had no written operating agreement. Plaintiffs, thus, turn to 6 Del Code § 18-101 (7), which provides that:

“‘Limited liability company agreement’ means any agreement . . . , written, oral or implied, of the member or members as to the affairs of a limited liability company . . . .”

and argue that, by virtue of filing the amended complaint, they implicitly agreed to give Larry Blumenstyk standing to sue on behalf of Dodge Mortgage. 6 Del Code § 18-402 provides, insofar as is here relevant, that:

“[u]nless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all of the members, the decision of members owning more than 50 percent of the said percentage or other interest in the profits controlling . . . .”

The individual plaintiffs allege that, in April 2010, they owned 30.55% of the shares of Dodge Mortgage. They speculate that, as the result of settlements Singer and Dodge Mortgage made with other interest holders, plaintiffs “may” have owned “as much as 100%” at the time that they filed the amended complaint (amended complaint, ¶¶ 147-148). Such vague conjecture is insufficient to support the plaintiffs’ position that they had the authority to give Larry Blumenstyk standing to raise claims on behalf of Dodge Mortgage.

#### **IV. Timeliness**

Plaintiffs contend that all of their derivative claims are governed by the six-year limitations period set forth in CPLR 213 (7). That subsection applies, in relevant part, to “an action by or on behalf of a corporation against a present or former director, officer or stockholder . . . .” Plaintiffs cite no case, and this court is aware of none, that holds CPLR 213(7) to be applicable to partnerships or limited liability companies. In CPLR 213(7), the legislature specifically provided an exception for actions brought on behalf of corporations to the shorter limitations periods for certain actions. It is for the legislature, not the courts, to extend the six-year period to other claims, such as derivative claims for other types of entities. In fact, CPLR 201 specifically provides that “[n]o court shall extend the time limited by law for the commencement of an action.” Accordingly, arguments that plaintiffs’ claims are governed by longer, foreign, statutes of limitations, pursuant to the borrowing statute, CPLR 202, are without merit.

## V. The Specific Causes of Action

### A. Breach of Fiduciary Duty

A cause of action for breach of fiduciary duty accrues upon the date of the alleged breach (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]). The applicable limitations period, either three or six years, is determined by the relief sought (*see id.* at 139; *Access Point Med., LLC v Mandell*, 106 AD3d 40, 43 [1st Dept 2013]). Here, plaintiffs seek money damages and incidental relief, such as an accounting, that will aid them in securing money damages. Accordingly, the first cause of action is governed by a three-year period (*see IDT Corp.*, 12 NY3d at 139). Insofar as the claim is based upon Singer's failure to renew the ground lease (*see* amended complaint, ¶ 176), which occurred in March 2007, and upon Singer's use of an unspecified "company[']s funds to secure personal releases" (amended complaint, ¶ 177), at any time more than three years prior to the commencement of this action, it is untimely. However, to the extent that the amended complaint alleges Singer diverted funds of Dodge Mortgage for his personal benefit within three years of the commencement of this action, the claim survives except as asserted by plaintiff Larry Blumenstyk.

### B. Derivative Claim for Accounting

The second cause of action, which alleges that "[p]laintiffs *as members and partners* have a right to an accounting of the monies paid to, collected by, and expended by the defendant entities" (amended complaint, ¶ 182, *emphasis added*), for all that it purports to be asserted derivatively, is clearly a personal claim. It is, therefore, duplicative of the eighth cause of action and, accordingly, it is dismissed.

### **C. Derivative Claim for Breach of Contract**

The third cause of action, a derivative claim for breach of contract, fails to state a claim because plaintiffs have neither supplied nor described any contract between Singer or HAS and Dodge Mortgage, Dodge I, or Dodge II that plaintiffs allege was breached. Rather, the claim alleges that Singer breached the partnership agreements of Dodge I and Dodge II (*see, e.g.*, amended complaint, ¶ 85). The Dodge entities were not parties to those agreements. Accordingly, a claim for breach of contract on behalf of such entities cannot survive this motion to dismiss.

### **D. Derivative Claim for Unjust Enrichment**

The fourth cause of action, alleging unjust enrichment, is governed by the six-year “catchall” statute of limitations (*see* CPLR 213 [1]; *Whittemore v Yeo*, 112 AD3d 475, 476 [1st Dept 2013]). The amended complaint alleges Singer looted the assets of Dodge I, Dodge II, and Dodge Mortgage for his personal benefit and for the benefit of certain associates. This allegation comes squarely within “the equitable principal that a person shall not be allowed to enrich himself unjustly at the expense of another” (*Georgia Malone Co. v Rieded*, 19 NY3d 511, 516 [2012], quoting *Miller v Schloss*, 218 NY 400, 407 [1916]). This claim shall survive, except as far as it is brought by Larry Blumenstyk on behalf of Dodge Mortgage, as discussed above.

### **E. Derivative Claim to Pierce the Corporate Veil**

The fifth cause of action fails to state a claim because an attempt to pierce the corporate veil is not an independent cause of action. Rather, it is an attempt by a plaintiff to “impose the corporate [defendant’s] obligation on its owners” (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *see also TAP Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]).

**F. Derivative Claim for Conversion**

Like the second cause of action, the sixth fails as a derivative claim. Plaintiffs allege that “as interest holders [they] had a right to possession of the *pro rata* share of their interests in Dodge Mortgage out of funds collected by Defendants but not paid out to Plaintiffs” (amended complaint, ¶ 207). The “interest holders” are the individual plaintiffs, not Dodge Mortgage, Dodge I, or Dodge II. This claim, therefore, duplicates the ninth cause of action. It is dismissed.

**G. Derivative Claim for Negligence**

The seventh cause of action, which alleges negligence, is dismissed as time-barred. The only negligent act of which plaintiffs complain is Singer’s failure to renew the ground lease in 2007.

**H. Individual Claim for Accounting**

Defendants do not seek dismissal of plaintiffs’ personal claims to an accounting.

**I. Individual Claim for Conversion**

The ninth cause of action alleges that Singer converted funds belonging to Dodge Mortgage. A claim of conversion must refer to specific property. When the property is money, a claim of conversion will lie “where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question” (*Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1st Dept 1990]). Plaintiffs’ allege that in June 2009, (1) Singer “paid over \$200,000 in a lump sum to Dodge Mortgage from one of the Dodge LPs”; (2) “[a]t about the same time, Singer established a separate bank account for Dodge Mortgage LLC for the first time”; and (3) “less than a year later . . . Singer paid out *pro rata* shares of that sum . . . to himself [and certain other individuals] who held interests in Dodge

Mortgage LLC according to the percentage ownership interest of each of those payees” (amended complaint, ¶¶ 56-58). Plaintiffs further allege that, in May and July 2010, Singer deposited another \$97,848 from one or more of the Dodge LPs into the Dodge Mortgage account. These allegations could suffice, in principle, to state a claim of conversion.

However, in one of the actions between Davenport and the Singer entities, the Nebraska appellate court held that neither Dodge I and Dodge II, as landlords, nor Dodge Mortgage, as mortgagee, had any rights to the rents of the commercial tenants once the ground lease terminated on May 31, 2008, and that all such rent was owed to Davenport (*Davenport Ltd. Partnership v 75<sup>th</sup> & Dodge II, L.P.*, 2010 WL 4680177 [Neb App, Nov. 6, 2010, No. A-10-246]). At oral argument on this motion, defendants contended that the conversion claim could not survive, because a plaintiff has no standing to complain that the property of another has been converted. As, according to plaintiffs’ allegations, any money Singer moved from the Dodge LPs to Dodge Mortgage in 2010 came from rents collected by the Dodge LPs, the conversion claim must be dismissed as to those funds, as plaintiffs had no possessory right or interest in them (*see* amended complaint, ¶ 52 and Singer aff, ¶ 23; *see also Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). As far as this claim is directed to any funds rightfully collected by the Dodge LPs before the termination of the lease on May 31, 2008, that claim is barred by the three-year statute of limitations for conversion (CPLR 214).

The court has considered the parties’ other arguments and found them to be without merit.

**CONCLUSION**

For the foregoing reasons, it is hereby

**ORDERED** that the branch of defendants' motion which seeks leave to reargue is DENIED as moot; and it is further

**ORDERED** that the motion of defendants Henry Singer, HAS Omaha Corporation, Dodge Mortgage LLC, 75th & Dodge I LLP, and 75th & Dodge II LLP to dismiss the amended complaint is GRANTED to the extent that the first cause of action is dismissed in its entirety with regard to plaintiff Larry Blumenstyk and, except as to acts performed no more than three years prior to March 20, 2013, with regard to the other plaintiffs, and the second, third, fifth through seventh, and the ninth causes of action are dismissed, and the fourth cause of action is dismissed solely to the extent of plaintiff Larry Blumenstyk's claim on behalf of Dodge Mortgage LLC; and it is further

**ORDERED** that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

**ORDERED** that counsel are directed to appear for a preliminary conference in Room 252, 60 Centre Street, on July 7, 2015, at 9:30 am.

This constitutes the decision and order of the court.

**DATED: June 2, 2015**

**ENTER,**

  
**O. PETER SHERWOOD** 6/2/15  
**J.S.C.**